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NO. 662

IN THE

Supreme Court of the United States

October Term 1963

UNITED STATES OF AMERICA, *Petitioner*

v.

NATHAN MANN, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN J. PICHINSON
Wilson Tower
Corpus Christi, Texas

LUTHER E. JONES, JR.
338 Laurel Drive
Corpus Christi, Texas

Attorneys for Respondent

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

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MAY IT PLEASE THE COURT:

QUESTION PRESENTED

Petitioner states the case correctly except that the QUESTION PRESENTED is not correctly stated.

The question presented is not, as petitioner suggests, whether error was committed by the trial court's giving the portion of its instructions which advised the jury

they might infer that defendant intended the natural and probable consequences of his conscious acts. Respondent did not complain of that portion of the instructions and the Court of Appeals expressly held that no error would have been committed had such instructions stood alone.

The thing that made the error was the inclusion in the charge of additional language operating to permit the jury to infer wilful intent from a certain factual hypothesis therein set forth unless respondent came forward with opposing evidence.

Premises considered, we respectfully submit that the QUESTION PRESENTED is as follows:

> Whether plain error was committed by the giving of instructions advising the jury in effect that, upon their believing that any person similarly situated to respondent and with like knowledge would reasonably have expected tax exasion to be a consequence of the conduct of his shown by the evidence, they were authorized, absent opposing evidence, to infer that his intent was tax evasion.

REASONS FOR DENYING THE WRIT

The question presented is foreclosed by previous decisions of this Court.

Morissette v. United States, 342 U.S. 246 (1952) is in point. It establishes that an instruction charges on presumptive intent when it does what the complained of instruction did, i.e. when it assumes a certain isolated factual hypothesis and tells the jury they may infer intent on finding the hypothesis true. An instruction of that kind has the effect of instructing the jury that the

law raises a presumption of intent from the hypothesized facts if they be found true and that the jury may act on this presumption UNLESS THE DEFENDANT COMES FORWARD WITH OPPOSING EVIDENCE. Concerning such an instruction this Court in *Morissette* held as follows:

> ". . . the trial court may not . . . prejudge the issue [of intent] by instruction that the law raises a presumption of intent from an act."

This Court also held in that case that one of the "incriminating presumptions" which may not properly be "improvised by the judiciary" is

> "a presumption which would permit but not require the jury to assume intent from an isolated fact."

Tot v. United States, 319 U.S. 463 (1943) is also in point. Under the federal statute there involved proof that defendant had possession of a firearm was made "presumptive" evidence of the ultimate fact of shipment, transportation or receipt of the firearm in violation of the statute. The presumption created by this statute was one of fact, i.e. an inference permitted to be drawn by the jury from particular facts. This Court invalidated the statute because, inter alia, it left the jury free

> "to act on the presumption [i.e. inference] alone once the specified facts are proved unless the defendant comes forward with opposing evidence."

This reasoning applies here. The complained of instruction called the jury's attention to a certain factual hypothesis they were at liberty to find or not find (to wit,

the hypothesis that a person similarly situated to respondent and with like knowledge would reasonably have expected tax evasion to be a consequence of the conduct of respondent shown by the evidence) and advised them that if they found the hypothesis true then they were authorized, absent opposing evidence, to draw an inference that respondent's intent was tax evasion. The effect of the instruction was to tell the jury that, upon their finding such hypothesis true, they then could infer intent unless the defendant came forward with opposing evidence. Such an effect, under the holding in *Tot*, could not be produced even by statute, and the court below was clearly correct in its decision that the language in the complained of instruction seeking to produce such effect was fundamentally erroneous. To give approval to such an instruction would be to shift from the prosecution to the defendant the burden of proving lack of criminal intent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted

JOHN J. PICHINSON
Wilson Tower
Corpus Christi, Texas

LUTHER E. JONES, JR.
338 Laurel Drive
Corpus Christi, Texas
Attorneys for Respondent

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